E COP

SEP 19 197?

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-295

GLORIA KENDALL LEBLANC and
HELEN JENKINS ROIG,
Petitioners,

versus

SOUTHERN BELL TELEPHONE & TELEGRAPH
COMPANY and STATE OF LOUISIANA,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION

MICHAEL J. MOLONY, JR.,
ROBERT K. McCALLA and
FRANK C. ALLEN, JR., of
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
225 Baronne Street — 25th Fl.
New Orleans, Louisiana 70112

SUBJECT INDEX

Page

TABLE OF AUTHORITIES i

QUESTION PRESENTED 1

STATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD NOT BE GRANTED 5

CONCLUSION 10

APPENDIX A 1a

TABLE OF AUTHORITIES

Cases:

Bowe v. Colgate-Palmolive Company, 416 F.2d 711 (7th Cir. 1969) 8

Cheatwood v. South Central Bell Telephone Co., 303 F.Supp. 754 (M.D. Ala. 1969) 10

Kober v. Westinghouse Electric Corp., 325 F. Supp. 467 (W.D. Pa. 1971) 9, 10

Manning v. General Motors Corp., ____ F.Supp. ____, 3 FEP 968 (N.D. Ohio, 1971) 9, 10

Richards v. Griffith Rubber Mills, 300 F.Supp. 338 (D. Ore. 1969) 9, 10

Ridinger v. General Motors Corp., 325 F.Supp. 1089 (S.D. Ohio, 1971) 9, 10

Rinehardt v. Westinghouse Electric Corp., ____ F.Supp. ____, 3 FEP 851 (N.D. Ohio, 1971) 9, 10

Rosenfeld v. Southern Pacific Company, 293 F. Supp. 1219 (C.D. Calif., 1968), aff'd, 444 F.2d 1219 (9th Cir. 1971) 9, 10

TABLE OF AUTHORITIES (Continued)

Cases: Page

Schaeffer v. San Diego Yellow Cabs, Inc., ____ F.2d ____, 4 FEP 946-950 ..... 5, 6, 7

Ward v. Luttrell, 292 F.Supp. 162 (E.D. La., 1968) 7

Weeks v. Southern Bell Telephone and Telegraph, 408 F.2d 228 (5th Cir. 1969) 10

Statutes:

42 U.S.C. §2000(e), et seq. 3

Section 706, 42 U.S.C. §2000e-5(g) 8

Louisiana Revised Statutes 23:311 ..... 1a

Louisiana Revised Statutes 23:314 ..... 1a

Louisiana Revised Statutes 23:332 ..... 1a

Louisiana Revised Statutes 23:336 ..... 2a

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 72-295

GLORIA KENDALL LEBLANC AND HELEN JENKINS ROIG,

Petitioners,

versus

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY AND STATE OF LOUISIANA,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent accepts petitioner's reference to the reports of the case below, jurisdictional statement, and citation of statutes involved.

QUESTION PRESENTED

Whether the Court of Appeals erred by refusing to find the District Court abused its discretion by not awarding damages.

STATEMENT OF THE CASE

Respondent is engaged in providing telephone and related services in Louisiana, Tennessee, Kentucky,

Alabama and Mississippi (A. 152-153). One of the jobs involved in the maintenance function is that of test deskman, "a central figure in handling equipment malfunctions for the Telephone Company" (A. 202; 30-34). Because of the duties of the test deskman, the company cannot limit the hours of employees in that job to 8 and/or 9 hours a day. This is caused primarily "because the number of malfunctions fluctuates considerably due to factors (such as storms) beyond the Telephone Company's control; because some malfunctions occur at night when no test deskman regularly works; and because if the repairman has been unable to correct a malfunction by the end of the shift, the test deskman must work overtime to help the repairman locate and repair the malfunction" (A. 205; 30-34).

Since 1908 the State of Louisiana has had in force statutes limiting the number of hours female employees can work. Since 1942 these statutes have restricted the number of hours female employees can work in certain jobs to 8 hours a day or 48 hours a week, and have provided a blanket restriction for female employees in all other jobs of 9 hours a day or 54 hours a week. Violations of the statutes are punishable by both fine and imprisonment (Appendix A, attached).

Because of the state criminal statutes limiting the number of hours female employees can work, respondent Telephone Company adopted and enforced a policy prohibiting the assignment of female employees to the job of test deskman in Louisiana (A. 152). In other states not having statutory restrictions on the number of hours female employees can work, the company as-

signed female employees to the test deskman job (A. 152-153).

Pursuant to that policy, respondent Telephone Company rejected petitioners' bids for the test deskman job (A. 41-43). Thereafter, petitioners filed charges with the Equal Employment Opportunity Commission alleging the rejection violated Title VII of the civil rights statute (A. 41-43). On February 16, 1967 the EEOC issued its decision (A. 249-253). The Commission concluded the Telephone Company's refusal to promote petitioners to the test deskman job violated Title VII of the Civil Rights Act solely because the test deskman job did not require hours in excess of those permitted by the state statute, and in any event, the duties of the test deskman job are similar to those of a switchboard operator and are, therefore, exempt from the 8 hour limitation. Both of these findings were rejected by the District Court and were not appealed. Nowhere in the Commission's decision did the Commission find the state statute was invalid or that the company would not be subjected to possible criminal prosecution for failing to obey the statute.

Thereafter, petitioners filed these proceedings in the Federal District Court under the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), et seq. alleging respondent's refusal to consider their bids for the test deskman job constituted unlawful sex discrimination.

The District Court held the state statutes were preempted by Title VII of the Civil Rights Act of 1964, but

rejected plaintiff's claim for damages on the following grounds:

> "[W]e think that several factors combine here to make damages and injunctive relief inappropriate. First, it is our conclusion that the Telephone Company was acting in good faith and that their employment practices were compelled by the state protective laws. This conclusion is buttressed by evidence that in states having no protective laws, the Telephone Company does promote women to the test deskman position and that they are willing to consider these plaintiffs for the job if the statute is declared invalid. In the circumstances of this case, the Telephone Company should not be liable in damages for its good faith to comply with the existing state statutes validly enacted and presumed constitutional and 'for its failure to predict the future course of constitutional law.'" (A. 210)

The Court of Appeals affirmed for the following reasons:

> "Congress granted broad discretion to the District Court to fashion remedies in Title VII cases as the equities of the particular case compel. The plaintiffs have not sustained their burden of showing that the District Court abused this discretion in declining to allow back pay for the reasons set forth in its opinion." (Appendix A to the Petition)

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. Certiorari should not be granted because this is not an appropriate issue for decision by the Supreme Court.

The issue presented is whether under the facts of this case the District Court abused its discretion by not awarding damages. Contrary to petitioners' assertion, the decision is not precedent for the general proposition that damages should not be awarded in Title VII cases. Rather, the decision recognizes the District Court's discretion to determine the scope of the relief and concludes that in the particular circumstances of this case the District Court did not abuse its discretion. For the Supreme Court to undertake the weighing process necessarily involved in the decision of this issue is not appropriate and the assumption of jurisdiction over such issues would quickly result in an overburdening of the Court's processes.

2. There is no conflict between the Court of Appeals' decision in this case and the decision by the Ninth Circuit in *Schaeffer v. San Diego Yellow Cabs, Inc.*

The primary reason offered by petitioners in support of their petition is that the Court of Appeals' holding in this case conflicts with the holding by the Ninth Circuit in the *Schaeffer* case (a copy of which is attached to the Petition as Appendix C).

It is submitted a close reading of the decision reveals to the contrary. In *Roig,* the court specifically recognized the issue is whether the District Court abused its discretion:

> "Congress granted broad discretion to the District Court to fashion remedies in Title VII as the equities of the particular case compel. The plaintiffs have not sustained their burden of showing that the District Court abused its discretion in declining to allow back pay for the reasons set forth in its decision." (Appendix A of the Petition, p. 17).

The Ninth Circuit Court of Appeals in *Schaeffer* characterized the issue confronting it in a similar manner:

> "However, the conclusion that the company violated Section 706(g) does not automatically entitle Schaeffer to the damages she demands. A court may enjoin and may award damages, but should only order affirmative action, such as back pay, when such relief is 'appropriate'. In the case of damages of this nature, a court must balance the various equities between the parties and decide upon a result which is consistent with the purposes of the Equal Employment Opportunity Act and the fundamental concepts of fairness." (Appendix C to the Petition, p. 36-37).

The fact that two Courts of Appeal applying essentially the same test to determine whether a lower court abused its discretion come to different results cannot be considered a conflict between the two circuits.

This is even more particularly true here in view of the significant differences between the circumstances present in the *Schaeffer* case and those present here. In *Schaeffer,* the employer continued to limit the overtime of female employees after the precise California state statute involved was declared invalid by a District Court in another case. On the other hand, in *Roig,* no court had held the statute invalid until the District Court in the *Roig* case issued its decision. On the contrary, when the plaintiffs in another case, *Ward v. Luttrell,* 292 F. Supp. 162 (E.D. La. 1968) sought to enjoin the State of Louisiana from enforcing the Louisiana maximum work hours laws applicable to women on the grounds the statutes were discriminatory and violative of the due process and equal protection clauses, a three judge court issued an order dissolving the court on the grounds that the constitutional question was substantial. Thus, unlike the *Schaeffer* case, the respondent in *Roig* was still exposed to possible criminal prosecution for violation of the state statute.

Further, in *Schaeffer,* even though another District Court had found the state statute was invalid, the Court of Appeals concluded the company should not be ordered to pay damages until after a subsequent decision by the Equal Employment Opportunity Commission was issued specifically finding the state statute was invalid and that compliance with the statute con-

stituted a violation of Title VII. No such decision has ever been issued by the Commission in this case.

At page 13 of their brief, petitioners also remark that the Seventh Circuit awarded back pay "under the same circumstances as are presented here" in *Bowe v. Colgate-Palmolive Company,* 416 F.2d 711 (7th Cir. 1969). A closer reading of the *Bowe* decision reveals, however, that the company in *Bowe,* on its own volition, adopted a requirement that female employees could not be placed in jobs requiring the lifting of more than 35 pounds. There was no federal-state dilemma as is present in the instant case (see 416 F.2d 717, at Footnote 5).

3. Certiorari should not be granted because the Court of Appeals' decision is correct.

The discretionary nature of the District Court's power to determine the appropriate relief in a Title VII proceeding under the provisions of Section 706, 42 U.S.C. §2000e-5(g) is fully established by Congressional use of the word "may" rather than "shall". This is further buttressed by Senator Dirksen's comments on the section:

> "This subsection dealing with a decision of the court has been modified to require that the court find the respondent has intentionally engaged in the alleged practice as a condition for the granting of relief. The *mandatory requirement* for affirmative action, including reinstatement and back pay, upon finding of a vio-

> lation *has been revised to read 'may* * * * order such affirmative action as *may* be appropriate, which may include reinstatement and back pay," [Emphasis added; 110 Cong. Rec. 12819 (daily ed. June 5, 1964), (Remarks of Senator Dirksen)]

Although petitioners argue a District Court must award damages if it finds a violation, the statutory wording and legislative history clearly establishes to the contrary. Judicial acceptance of this principle is now beyond question. Every court considering the issue in circumstances similar to those presented here has concluded it has discretionary power to determine the nature of the remedy. *Ridinger v. General Motors Corp.*, 325 F.Supp. 1089 (S.D. Ohio, 1971); *Manning v. General Motors Corp.*, ____ F.Supp. ____, 3 FEP 968 (N.D. Ohio, 1971); *Kober v. Westinghouse Electric Corp.*, 325 F.Supp. 467 (W.D. Penn. 1971). See also, *Rinehardt v. Westinghouse Electric Corp.*, ____ F.Supp. ____, 3 FEP 851 (N.D. Ohio, 1971); *Rosenfeld v. Southern Pacific Company*, 293 F.Supp. 1219 (C.D. Calif., 1968), [affirmed, 444 F.2d 1219 (9th Cir. 1971)]; *Richards v. Griffith Rubber Mills*, 300 F.Supp. 338 (D. Ore. 1969).

The District Court, after a thorough review of the facts in this case, concluded damages were inappropriate because the Telephone Company was "acting in good faith and that their employment practices were compelled by the state protective laws. This conclusion is buttressed by evidence that in states having no protective laws, the Telephone Company does promote women to the test deskman position and they are will-

ing to consider plaintiffs for the job if the statute is declared invalid."

The evidence fully supports this factual conclusion and was affirmed by the Court of Appeals. Petitioners, by their reference to *Weeks v. Southern Bell Telephone and Telegraph*, 408 F.2d 228 (5th Cir. 1969), and *Cheatwood v. South Central Bell Telephone Co.*, 303 F.Supp. 754 (M.D. Ala. 1969), seek to challenge that factual finding (see p. 10 of petitioners' brief). This, it is submitted, is not an appropriate issue for determination by this Court.

Further, the reasonableness of the District Court's decision and its refusal to award damages is sustained by the fact that every court facing the dilemma of the legal controversy over conflicting state and federal legislation has concluded damages are not appropriate. *Ridinger v. General Motors Corp.*, 325 F.Supp. 1089 (S.D. Ohio, 1971); *Manning v. General Motors Corp.*, ____ F.Supp. ____, 3 FEP 968 (N.D. Ohio, 1971); *Kober v. Westinghouse Electric Corp.*, 325 F. Supp. 467 (W.D. Penn. 1971); *Rinehart v. Westinghouse Electric Corp.*, ____ F.Supp. ____, 3 FEP 851 (N.D. Ohio, 1971); *Rosenfeld v. Southern Pacific Co.*, 293 F.Supp. 1219 (C.D. Calif. 1968) [affirmed, 444 F.2d 1219 (9th Cir. 1971)]; *Richards v. Griffith Rubber Mills*, 300 F.Supp. 338 (D. Ore. 1969).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DATED: _____

FRANK C. ALLEN, JR.,
MICHAEL J. MOLONY, JR.,
and ROBERT K. McCALLA of
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
225 Baronne Street - 25th Floor
New Orleans, Louisiana 70112
ATTORNEYS FOR
RESPONDENT

CERTIFICATE

I hereby certify that a copy of the above and foregoing Brief for Respondent in Opposition has been served, by depositing same in the United States Mail, postage prepaid, on the following persons:

Mr. Leonard A. Washofsky
1411 Decatur Street
New Orleans, Louisiana 70116
Counsel for Petitioners

Mr. William J. Guste, Jr.
Attorney General
State of Louisiana
104 Supreme Court Building
New Orleans, Louisiana 70112

New Orleans, Louisiana, this __ day of _____, 1972.

_____

FRANK C. ALLEN, JR.

APPENDIX "A"

La. R.S. 23:332 provides:

> "No female shall be employed in any manufacturing, mechanical or mercantile establishment, laundry, hotel, theatre, restaurant, telephone or telegraph or transportation company, or in the operation of passenger or freight elevators, for more than eight hours in any one day and not more than forty-eight hours or six days in any consecutive seven day period."

La.R.S. 23:311 provides:

> "No female shall be employed in any mine, packing house, bowling alley, bootblack establishment, in the distribution of merchandise, in or about any place of amusement where intoxicating liquors are made or sold, or in any other occupation not covered by Sub-part C of this Part, for more than nine hours in any one day or fifty-four hours in any one week."

La.R.S. 23:314 provides:

> "Whoever violates any provisions of this Subpart shall be fined not less than twenty-five dollars nor more than fifty dollars, or imprisoned for not less than ten days nor more than six months, or both."

La.R.S. 23:336 provides:

> "Whoever refuses to exhibit to the commissioner of labor or his authorized representatives the record required by R.S. 23:332 or makes a false statement in connection therewith or in connection with any other matter pertaining to the provisions of this Sub-part, or violates any other provisions of this Sub-part, shall be fined not less than one hundred dollars nor more than two hundred and fifty dollars, or imprisoned for not less than thirty days, nor more than ninety days, or both."